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No. 71-213

In the Supreme Court of the United States

OCTOBER TERM, 1971

FRED HAYES AND KENNETH McMASTER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
DAVID L. NORMAN,
Assistant Attorney General,
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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-5) is not yet reported. The district court did not render an opinion.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1971; rehearing was denied on July 14, 1971. The petition for a writ of certiorari was filed on August 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge erred in admitting evidence of petitioners' prior criminal acts to prove peti-

tioners' specific intent to commit the offenses charged in the indictment.

2. Whether petitioners are entitled to a new trial by reason of allegedly improper statements made by the United States Attorney in his summation to the jury.

3. Whether a new trial should be ordered because of alleged errors committed by petitioners' retained trial counsel in conducting petitioners' defense.

STATUTES INVOLVED

18 U.S.C. 241 provides, in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; * * *
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; * * *.

18 U.S.C. 1509 provides, in pertinent part:

> Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT

Petitioners were convicted of violating 18 U.S.C. 241 and 18 U.S.C. 1509 by dynamiting 33 school buses

owned by the Longview, Texas, School District in an effort to prevent the school system from complying with a federal court order to desegregate its schools. Petitioners were sentenced to maximum terms of imprisonment pending the results of a study pursuant to 18 U.S.C. 4208. The court of appeals affirmed on June 17, 1971 (Pet. App. A).

The court of appeals accurately described petitioners as "part of a group of white residents of Longview, Texas, who allegedly feared a 'revolution' of black members of the community, and * * * met frequently to discuss and prepare for their defense against the purported forthcoming Negro uprising" (Pet. App. A2). To that end, the group acquired various lethal weapons, and the dynamite later used to damage the Longview school buses (App. 465–472; 1163).[1] On several occasions prior to the bus bombing, the petitioners took action designed to intimidate Negroes who sought to exercise their civil rights. An indicted co-conspirator, Robert Sparks, Jr., testified that in 1970 he and the petitioners planted "booby trapped" flashlights charged with dynamite in the streets of Nacogdoches, Texas, in an effort to discourage Negro civil rights demonstrations then occurring in that city (App. 760–765). Another co-conspirator, Glen Parker, testified that on June 25, 1970, he was the driver when petitioner Hayes dynamited a house recently purchased by a Negro woman in a formerly all-white neighborhood (App. 1144–1147).

[1] "App." refers to the "Appendix to the Briefs" which was filed in the court of appeals and a copy of which was lodged with this Court by petitioners.

Parker told of being present while petitioners planned to dynamite the Longview school buses, on July 4, 1970, in order to prevent the implementation of a desegregation order (App. 1157–1159). Sparks testified to observing the parking lot with petitioner Hayes in order to plan the bombing (App. 800–806). Both related admissions of Hayes after the bombing (App. 808–809; 1168).

ARGUMENT

1. Petitioners contend that the trial court erred in admitting evidence of other violent acts committed by petitioners (*i.e.*, the planting of "booby traps" and the house bombing) to intimidate Negroes in the exercise of their rights. However, when, as here, the defendants' specific intent is an essential element of the offense charged,[2] evidence of prior criminal activity is admissible if it is relevant to proof of defendants' intent in committing the offense at issue. *United States* v. *Justice,* 431 F. 2d 30 (C.A. 5); *United States* v. *Marine,* 413 F. 2d 214 (C.A. 7), certiorari denied, 396 U.S. 1001; *Von Feldt* v. *United States,* 407 F. 2d 95 (C.A. 8).

Proof of petitioners' prior acts of intimidation—both of which were racially motivated and occurred shortly before the dynamiting of the buses—was relevant to the issue of petitioners' intent since it tended

[2] In order to prove an offense under 18 U.S.C. 241, the government must prove that the defendants acted with the specific intent to injure a citizen in the free exercise of any right secured by the Constitution or laws of the United States. See, *e.g.*, *United States* v. *Guest*, 383 U.S. 745; *United States* v. *Cruikshank*, 92 U.S. 542.

to prove that petitioners were engaging in a course of conduct designed to intimidate Negroes in the exercise of their rights (see Pet. App. A3).[3]

2. Petitioners further contend that certain statements made by the United States Attorney during his summation to the jury were improper and were sufficiently prejudicial to vitiate their convictions (see Pet. App. A4). The prosecutor remarked that a child had asked him, "Why did those men bomb those buses?" (App. 1491). Later the prosecutor said, "There is no doubt in anybody's mind in this courtroom that they are guilty" (App. 1493). No objection was made to the first statement. The court below observed that there was no plain error in the remark and any impropriety was waived by counsel's failure to object. See also *Singer* v. *United States,* 380 U.S. 24, 30; *United States* v. *Fuentes,* 432 F. 2d 405, 409 (C.A. 5); *United States* v. *Dibrizzi,* 393 F. 2d 642, 645 (C.A. 2); *Heald* v. *United States,* 175 F. 2d 878 (C.A. 10). The objection taken to the remark about guilt was sustained by the trial court. Moreover, in his charge the trial judge admonished the jury that statements and arguments of counsel are not evidence

[3] Petitioners also object to the admission of evidence relating to the Nacogdoches incident on the ground that they were prosecuted by the state for that offense and acquitted. However, petitioners' trial for that offense occurred subsequently to their conviction here. Moreover, they were not acquitted of the charge. The case (cause No. 8995–70–12, 145th Judicial District Court of Nacogdoches County, Texas) was dismissed on February 22, 1971, upon the request of the state prosecutor, when a principal witness for the prosecution declined to testify to procedures used by him in disarming a bomb on the ground that he would be obliged to disclose classified military information.

(App. 1510; Pet. App. A4). Finally, as the court below observed, "Because of the overwhelming evidence of guilt, it can hardly be said that appellants were prejudiced in the minds of the jury by the prosecutor's comments" (Pet. App. A4).

3. Petitioners claim, as they did below, that they were inadequately represented at trial (Pet. 5–6). Both courts below found the contentions to be without merit (see App. 1551–1592; Pet. App. A4–5), Indeed, the court of appeals viewed the criticism, particularly of the decision not to have the defendants testify, as retrospective criticism of defense counsel's trial strategy, and properly held that the fact that the "trial strategy was unsuccessful is no reason for * * * a new trial" (Pet. App. A5). Cf. *Lutwak* v. *United States*, 344 U.S. 604, 619.[4] Accordingly, petitioners' assertion of inadequate counsel provides no basis for further review by this Court.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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ROBERT S. GREENSPAN,
Attorney.

SEPTEMBER 1971.

[4] Petitioners were represented by able and experienced trial counsel. The principal defense counsel, Mr. Tunnell, was formerly a United States Attorney. Co-counsel, Mr. Gibson, in addition to his lengthy experience as an attorney, served as a county judge (Pet. App. A4–5).

U.S. GOVERNMENT PRINTING OFFICE: 1971